refused to live with the husband without sufficient reason. In the absence of solid evidence, it strains credulity to suggest that the appellant who had no qualms in abandoning the children and the matrimonial home on a number of occasions, left the husband with sufficient reason.

I now come to ground 4, which is an appeal on quantum. The respondent is a draftsman attached to the City Hall, drawing a total salary of $802 and after various deductions his take home salary is between $320 and $350. With that amount he has to support his second wife, the 4 children and a younger brother. Speaking for myself, I very gravely doubt whether the sum of $55 is sufficient to maintain three growing-up children in this jet age. Times have changed; the cost of living has gone up. Bearing that in mind I would award a monthly sum of $30 in respect of each child, to take effect from 1 June 1971 and further order that this sum of $90 p.m. be attached from the respondent's salary.

Order accordingly.

SYED AZIZ BIN IBRAHIM v. HAYWARD

[F.C. — (Ong C.J., Suffian and Ali F.JJ.) July 3, 1973]
[Kuala Lumpur — Federal Court Civil Appeal No. 17 of 1973]

Practice and Procedure — Notice of Appeal served after date of filing but within the time limited for filing — Whether valid — Federal Court (Civil Appeals) (Transitional) Rules 1963, rr. 6 & 7.

In this case the appellant filed his notice of appeal on January 25, 1973 and the notice was served on the opposite party on the January 30, 1973. This date was within the time prescribed for filing the notice of appeal. A preliminary objection was raised that the notice of appeal was not served "at the time of filing the notice of appeal" as required by rule 7 of the Federal Court (Civil Appeals) (Transitional) Rules, 1963.

Held: it is sufficient if the notice of appeal is served within the time limited for filing the notice of appeal and as this was done in this case the preliminary objection must be dismissed.

Cases referred to:-

(1) *Monk* v. *Warbey* [1935] 1 K.B. 75, 81.
(2) *Tan Ting Kok* v. *Cheong Lep Keen* [1969] 1 M.L.J. 153.

FEDERAL COURT.

P. Devadas for the appellant.

S. G. Thakurta for the respondent.

Ong C.J. (read by **Suffian F.J.**): Judgment for damages in a running down case was delivered by the High Court in Malacca on January 10, 1973. The defendant appealed against part of the judgment by filing his notice of appeal on January 25. This was done within the period of one month as laid down by rule 13 of the Federal Court (Civil Appeals) (Transitional) Rules 1963. The notice was served on the opposite party affected on January 30. This date was still within the prescribed limit of one month for filing notice of appeal.

At the commencement of the hearing of this appeal counsel for the respondent raised a preliminary objection, based on rule 7 that "notice of appeal shall be served on all parties directly affected by the appeal or their solicitors respectively *at the time of filing the notice of appeal*". It was argued that the delay of 5 days in sending the notice was fatal.

This contention has only to be stated in plain language to reveal what a sad mistake it was. If it is right, a valid notice becomes invalidated if not served simultaneously with the filing of the notice. "At" could not mean "after" — even by a day or an hour, which makes the proposition absurd. This view clearly stems from the common error of picking out a solitary sentence from a judgment in a reported case and failing to read it in its own proper context: See *Monk* v. *Warbey*.(1) Counsel for the defendant relied on what was said in *Tan Ting Kok* v. *Cheong Lep Keen*(2) where there was an omission by the appellant to *serve* the notice of appeal within the period limited for *filing* the notice. I do not think it necessary to say any more, except that rule 7 was badly worded and that "at the time of" should have been better substituted by "within the time limited for filing". We therefore summarily dismissed the objection.

Suffian F.J.: We dismissed the respondent's preliminary objection and I now give my reasons.

The appellant lost his case in the High Court on 10th January, 1973. He wanted to appeal. He must not do so "after the expiration of one month from the date on which the judgment was pronounced", rule 13 of the Federal Court (Civil Appeals) (Transitional) Rules, 1963. Put positively, this means that he must do so before the expiration of one month after the date of the judgment. He had to take two steps:

(a) he had to give notice of appeal to the court, rule 6(1); and

(b) he had to serve a copy of that notice to the other side, rule 7.

First, he gave notice of appeal on 25th January, 1973. Secondly, he served a copy of the notice of appeal on the respondent; he did so however not on 25th but on 30th January, 1973: it will be observed that he did so before the expiration of one month after the date of the judgment.

Though the appellant served a copy of the notice of appeal on the respondent before the expiration of one month after the date of the judgment, the respondent raised a preliminary objection, arguing that the appeal was not properly brought before the court on the ground that the appellant should have served on the respondent a copy of the notice of appeal in the words of rule 7 "at the time of filing the notice of appeal", meaning on 25th January itself, not five days later, and for this argument the respondent relied on a judgment of the Federal Court delivered by me in *Tan Ting Kok* v. *Cheong Lep Keen and Another*.(2)

We rejected that argument, and it is desirable for me to explain *Tan Ting Kok*. The judgment in that case was not happily worded and has given rise to misunderstanding. That case did not mean to decide that the appellant must serve a copy of the notice of appeal on the respondent at the same time as he filed his notice of appeal. It is enough if he did so before the expiration of one month after the date of the judgment appealed against. What happened in *Tan Ting Kok* was that judgment was delivered on

31st July, 1968, notice of appeal was filed on 21st August, 1968 (namely, within one month as required by rule 13), but no copy of the notice of appeal was served at all on the respondent, whether within or after one month, and it was for that reason that the court there struck out the appellant's appeal.

Ali F.J. concurred.

Preliminary objection dismissed.

Solicitors: *Devadas & Co.; Allen, Gledhill & Ball.*

YONG CHIANG v. BONG TJHIN OI

[F.C. (Azmi L.P., Suffian and Ong Hock Sim F.JJ.) August 10, 1973]

[Johore Bahru — Federal Court Civil Appeal No. 120 of 1972]

Landlord and Tenant — Action for recovery of possession — Whether premises controlled premises — Whether shophouse completed before or after January 31, 1948 — House built on old foundations — Whether new building — Control of Rent Act, 1966, s. 4(2)(a).

In this case the respondent claimed recovery of a shophouse let to the appellant. The shophouse had been rebuilt in 1950 on the site of the former shophouse which had been burnt and destroyed during the last war. In building the shophouse almost the whole of the old foundation of the former building, its side walls and rear wall up to a certain height were retained, but the rest of the building was entirely new. The major issue in the case was whether the shophouse was a building completed before or after January 31, 1948 and therefore whether it was controlled premises or not. The learned trial judge held that it was a building completed after January 31, 1948 and therefore not controlled premises [1973] 1 M.L.J. 59). The appellant appealed.

Held: in view of the extensive nature of the work done on the building, an altogether different building had arisen from the ashes of the old, even though the building was built on the same foundations and had the same ground floor. The premises were therefore not controlled premises and the appeal must be dismissed.

Cases referred to:

(1) *Mohamed bin Myddin* v. *Teo Mek Yoh* [1966] 2 M.L.J. 284.
(2) *Leong Yoong* v. *Lee Sem Yoong* [1968] 2 M.L.J. 72.
(3) *A. V. Vandayar & others* v. *Sivagami Achi & Anor.* A.I.R. 1949 P.C. 319.
(4) *Government of State of Penang and another* v. *B. H. Oon & Ors.* [1971] 2 M.L.J. 235.
(5) *Kai Nam* v. *Ma Kam Chan* [1956] A.C. 358.
(6) *Eastern Realty Co. Ltd.* v. *Chan Hua Seng* [1967] 2 M.L.J. 195.
(7) *Success Enterprises Ltd.* v. *Eng Ah Boon* [1968] 1 M.L.J. 75.
(8) *Shanon* v. *McMahon* [1945] I.R. 332.
(9) *Pritam Kaur* v. *Rajaratnam & Anor.* [1970] 2 M.L.J. 109.
(10) *Tioh Kooi Lan* v. *Ismailjee* [1972] 1 M.L.J. 64.

FEDERAL COURT.

R. R. Chelliah for the appellant.
J. L. Chua for the respondent.

Suffian F.J.: The dispute here concerns the nature of shophouse No. 50, Jalan Abdullah, Muar, of which the plaintiff (respondent before us) is owner and the defendant firm (appellant) tenant. The landlord purported to determine the tenancy on 31st August, 1968, by a notice to quit dated 17th July, 1968, and served on the defendant the same day. The tenant refused to vacate, whereupon the landlord sued to recover possession.

The major defence pleaded was that the shophouse is governed by the Control of Rent Act, 1966, because (it was said) it was completed on or before 31st January, 1948, and the work done on it after that date consisted only of repairs and renovations, so that no order or judgment for the recovery of possession may be made except in any of the cases specified in sections 16 and 18 of the Act.

Thus the major issue here is — is the shophouse a building "completed after the 31st day of January, 1948" within the meaning of section 4(2)(a) of the Control of Rent Act, 1966? If it is, it is not controlled premises and not subject to that Act; if it is not, it is controlled premises and so subject.

The landlord contends that it is. The tenant contends that it is not.

The learned trial judge agreed with the landlord and the tenant has appealed to us.

The first point taken before us relates to the onus of proving that the shophouse is a building completed after the prescribed date. At the trial there was no argument on this point, as counsel for the tenant conceded that the onus was on the tenant.

If I had to decide this point on general principles, I would say that it is for the tenant to prove that the shophouse is subject to the Act, because the general rule is that a landlord is free to impose any condition as to rent, security of tenure, etc., he pleases on his property, and if the tenant seeks protection against a notice to quit given by the landlord, it is for him to prove that he (the tenant) is protected by any special terms in the lease or by any special legislation. But the position is that the general principle has been expressly altered by statute, namely, section 4 of the Act, the relevant parts of which provide —

"(1) Except for the premises mentioned in subsection (2) all premises shall be subject to the operation of the provisions of this Act and any such premises shall for the purposes of this Act be called 'controlled premises'.

(2) The following premises shall be free from the operation of any of the provisions of this Act, namely —

(a) buildings completed after the 31st day of January, 1948;
...."

It will be observed that the general scheme of the section provides that *all* premises are controlled premises and therefore subject to the Act — except premises of the kind mentioned in subsection (2) of the section. The plaintiff landlord did not deny that the shophouse constituted premises but maintained that it was a building completed after 31st January, 1948, within the meaning of paragraph (a) of subsection (2). If no evidence at all had been given on either side, the plaintiff's claim would have failed and I am therefore of the opinion that by virtue of section 102 of the Evidence Act, 1950, as exemplified by illustration (b), the burden of proving that the shophouse was completed after 31st January, 1948, was on the plaintiff-landlord. This is inconsistent with the decision of this court in *Mohamed bin Myddin* v. *Teo Mek Yok*,[1] but consistent with a later decision of this court in *Leong Yoong* v. *Lee Sem Yoong*,[2] following a decision of the Privy Council in *A. V. Vandayar & Others* v. *Sivagami Achi and Another*.[3] I am of the opinion that *Mohamed bin Myddin*[1] had been decided per